IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

No. 61

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the Inland Waterways, Inc., *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

## BRIEF FOR AMICUS CURIAE.

**(Howard Industries, Inc.)**

RAOUL BERGER
*Attorney for Amicus Curiae*
Suite 1116, Ring Building
1200 - 18th Street, N. W.
Washington 6, D. C.

*Of Counsel*
GOTTLIEB, SCHWARTZ & FRIEDMAN
Chicago, Illinois

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX.



## LIST OF AUTHORITIES CITED.

CASES:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

---

No. 6

---

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the Inland Waterways, Inc., *Petitioner*,

v.

UNITED STATES OF AMERICA.

---

## BRIEF FOR AMICUS CURIAE.

### (Howard Industries, Inc.)

---

The decisions below, jurisdiction to review, the provisions of the statute and executive order involved, and the statement of the case are set forth in Petitioner's Brief.

## INTEREST OF AMICUS.

In *Howard Industries, Inc.* v. *United States*, 113 C. Cls. 231, 83 F. Supp. 337, the Court of Claims decided the issues here presented in favor of Amicus and against the Government.* Because of the conflict between that decision

---

* Accord: *Warner Const. Co.* v. *United States*, 80 F. Supp. 81 (D. D. C., 1948); same case, 113 C. Cls. 265, 83 F. Supp. 344 (1949); *Spicer* v. *United States*, 113 C. Cls. 267, 83 F. Supp. 345 (1949); *Modern Engineering Co.* v. *United States*, 113 C. Cls. 272, 83 F. Supp. 346 (1949); *Milwaukee Engineering & Shipbuilding Co.* v. *United States*, 113 C. Cls. 276, 83 F. Supp. 348 (1949); *Stephens-Brown, Inc.* v. *United States*, 81 F. Supp. 969 (W. D. Mo., 1949); *Pittston-Luzerne Corp.* v. *United States*, 84 F. Supp. 800 (M. D. Pa., 1949); *Prebilt Co.* v. *United States*, 88 F. Supp. 588 (D. Mass., 1950). See also *McGann Mfg. Co.* v. *United States*, 83 F. Supp. 957 (M. D. Pa., 1949).

and that of the court below in the *Fogarty* case, certiorari was sought by petitioner and acquiesced in by the Government. Final disposition of the *Howard Industries* case has been postponed by the Court of Claims pending the outcome of the *Fogarty* case. Thus, decision by this Court against petitioner in the *Fogarty* case will foreclose recovery by Amicus in the Court of Claims. Our sole concern is with the construction of the Lucas Act.

## SUMMARY OF ARGUMENT.

### I

Relief for war contractors was limited by the First War Powers Act to cases where "such action would facilitate the prosecution of the war." The administrators granted relief only to those contractors whose continued operation was important to the war effort. After the surrender of Japan on August 14, 1945, some Government agencies refused relief because it could no longer facilitate the prosecution of the war.

The Lucas Act was enacted to remedy resulting hardships. In place of relief to "facilitate the prosecution of the war" the Lucas Act substituted the settlement of "equitable claims * * * for losses * * * incurred * * * without fault or negligence."

This language was deliberately chosen to remedy the hardships disclosed at the hearings. The legislative history indicates a Congressional purpose to grant "fair relief, equitable relief" to contractors who had assisted in the war effort and had incurred losses through no fault or negligence of their own. And it shows that the language of the Lucas Act was carefully chosen to provide broader and "further relief" despite executive recommendations that relief be restricted to the narrow administrative categories engrafted upon the First War Powers Act.

## II

The Lucas Act provides that

> "a previous settlement * * * shall not operate to preclude further relief * * *"

The Executive Order which directs that

> "no claim shall be considered if final action with respect thereto was taken"

on or before August 14, 1945, conflicts with the statute and is void.

The original bill provided that no relief was allowable where there had been a final disposition of the case. When the attention of the Committee was called to the resulting hardships, that provision was eliminated and replaced by the present § 3 which removes the bar of a "previous settlement." The Executive Order cannot now replace that provision with one that was so emphatically rejected.

The argument that the word "settlement" means only unilateral agency determinations, not bilateral agreements, is rebutted by the relevant statutory provisions and leads to unreasonable results.

## III

Lucas Act relief is conditioned upon the filing of "a written request for relief" with the appropriate agency in a form sufficient to have given notice to the Government that it was for losses incurred. The Act does not require that it should have been cast in any particular form, nor that it should have contained any special phraseology.

## IV

Congress recently passed a bill which repudiates the Government's construction of the Lucas Act; and in the accompanying reports it stated that the Government has "aborted" and "abrogated" the Act. The President's rejection of the Congressional construction, in vetoing the

bill, is flatly contradicted by the legislative history of the Lucas Act, and represents an extraordinary attempt to amend a statute. This can no more be accomplished by veto message than by Executive Order.

## ARGUMENT.

### I.

### The Lucas Act Affords Broader Relief Than the First War Powers Act.

The court below held that relief under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 Note) was limited to that earlier allowable under the First War Powers Act, (Act of December 18, 1941, 55 Stat. 839, 50 U. S. C. App. 601 et seq.), thus giving effect to paragraph 307 of Executive Order No. 9786,[1] The Court of Claims held, however, that

> "* * * Paragraph 307 of Executive Order 9786 is a regulation unauthorized by the Lucas Act and is in direct conflict with the express terms of the act and with its intent as revealed in its legislative history." 83 F. Supp. at 341.

This view, we submit, is fully supported by the language and legislative history of the Lucas Act. We shall show that when Congress enacted the Lucas Act it deliberately departed from the terms of the First War Powers Act, and employed entirely dissimilar terms in order to meet the mischief created by restrictive administrative constructions of the earlier Act.

---

[1] Paragraph 307 provides:

> "*Relief* with respect to a particular loss claimed *shall not be granted* under the Act and these Regulations *unless* the war agency considering the claim finds * * * that *relief would have been granted under the First War Powers Act, 1941*, if final action with respect thereto had been taken by the war agency on or before August 14, 1945." (Emphasis supplied throughout)

### 1) The Ruling of the Court Below Conflicts With the Express Statutory Terms.

Comparison of the Lucas Act with the First War Powers Act, 1941, instantly discloses that the former provided new and different relief. Section 201 of the latter provided that a war agency might afford relief to a war contractor by contractual modifications whenever the agency

> "deems such action would facilitate the prosecution of the war * * *."

That determination is not a prerequisite to relief under the Lucas Act. Instead, §1 of that Act authorizes the same war agencies to

> "settle *equitable* claims of contractors, * * * for *losses*[2] * * * *incurred* between September 16, 1940 and August 14, 1945, *without fault or negligence* on their part * * * ."

Section 2(a) reiterates the "equitable" note, which played no role under the First War Powers Act:

> "In arriving at a *fair and equitable* settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of *net loss* * * * on all contracts and subcontracts held by the claimant * * *."

---

[2] Prior to the Lucas Act "losses" had not moved the agencies to grant relief.

> "The Navy Department has consistently maintained the position that contractors * * * should be held to the terms of the contract in the absence of fault on the part of the Government, and that any loss resulting from business risks assumed by the contractor must be borne by him. * * * there does not seem any obligation—legal, equitable, or moral—upon the Government to reimburse the contractor for his losses." Hearings on S. 1477, Subcommittee of Sen. Comm. on Judiciary (79th Cong. 2d Sess., 1946) (hereinafter Hearings), 4.

In place, therefore, of contractual modifications to "facilitate the prosecution of the war," the Lucas Act substituted the settlement (i.e. adjustment) of "equitable claims * * * for losses * * * incurred * * * without fault or negligence * * * ." This Court has observed under similar circumstances that:

> "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930).

Additional evidence that the Lucas Act provides broader relief than its predecessor is furnished by §3:

> "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief * * *."

The bar of a settlement under the Contract Settlement Act was removed by §3, in order to grant "further relief," not to remit a contractor to the narrow First War Powers Act relief which had been enlarged by the Contract Settlement Act.[3] This is likewise true of the §3 removal of the bar of previous settlements under the First War Powers Act. Presumably the administrators had awarded all the relief that was available under their construction of that Act. To limit relief to that obtainable under that Act would prevent "further relief," thus rendering the Lucas Act nugatory. In short, if relief is confined to that obtainable under the First War Powers Act, that is to the Procrustean categories set up by the Armed Services as facilitating the pros-

[3] "Further evidence that the Lucas Act provides broader relief than was contemplated by the First War Powers Act is found in the language of Section 2 directing that in determining the amount of a contractor's net losses, consideration shall be given to relief granted under the Contract Renegotiation Act, the Contract Settlement Act of 1944, the First War Powers Act, or any other relief granted." *Howard Industries, Inc.* v. *United States*, 83 F. Supp. at 340.

ecution of the war,[4] the new authorization to settle (i.e., adjust) equitable claims for losses incurred without fault is deprived of its intended effect.

2) Legislative History

So plain is the language of the Lucas Act that there is no need to resort to legislative history. We review that history only to show that Congress was determined to correct the evils resulting from restrictive administrative interpretations[5] of the earlier act, and that it chose apt language to achieve that result.

---

[4] The Navy representative described its "threefold" test of relief:

> "First, the materials had to be needed by the Government. Secondly, that we could not get the materials we needed in that way except from this particular contract. If we could get it from some other source, it was too bad. And, third, the contractor had to have this relief and get the money or otherwise he could not keep in business." Hearings, 67.

The Army categories likewise precluded relief in the average "loss" case. The three hardship categories, according to the Army representative were

> "* * *. [1] where we needed to maintain a contractor in business to prosecute the war * * *. [2] where a contractor suffered a loss through definite acts on the part of the Government * * *. [3] where a contractor relied on a specific promise of people that should have been able or had the authority to carry them out." Hearings, 56.

[5] During the war, relief was withheld "notwithstanding the merits or equities involved" unless continued production by the particular contractor was "important to the war effort." Hearings, p. 18.

After V-J Day the War Department concluded that the grant of relief to contractors would no longer facilitate the prosecution of the war. Chairman McCarran commented

> "Of course, that is an *extremely narrow view* to take of the language * * *." Hearings, 39.

And, commenting on the position that *payment* must facilitate prosecution of the war, he changed the emphasis radically:

> "If, *at the time the contractor sustained the loss*, he was in the act of *assisting in the prosecution* of the war * * *, that is the

As originally drafted, the bill provided that relief could be granted

> "whenever the head of such department or agency makes a determination that such action is necessary *to prevent a manifest injustice* * * *." Hearings, 1.

The subcommittee had been advised by the Attorney General at the outset of the *distinction* between the First War Powers Act which permitted modifications of contracts and the like whenever

> "such action would facilitate the prosecution of the war,"

and modification of contracts under the proposed bill when

> "such action was necessary to *prevent an injustice.*" Hearings, 2.

Mr. Weitzel of the General Accounting Office underscored this distinction when he stated that

> "if paying more * * * to a contractor who had no further contracts with the Government were requested, the Department would feel that that was not an aid to the prosecution of the war. So, of course, *this provision that you now have is much broader*, in that the same action can now be taken if necessary to *prevent a manifest injustice.*" Hearings, 28.

Senator Revercomb interrupted to declare that

> "*I would not want to limit this in furtherance of the war,* if the Government went into a contract under

---

spirit in my judgment of the law. * * * The spirit giveth life, they say, but the *letter killeth*. That is pretty *true in this case.*" Hearings, 39.

Subsequently he said respecting a woolen mill, Hanover Mills, that

> "by a *technical interpretation* they were *denied the relief* that to me, speaking as an individual, *would have appeared justifiable.*" Hearings, 65.

And he repeated, on page 66, that the position of the War Department "was a *very technical construction.*" This position was characterized by Senator Lucas, the proponent of the bill, as "specious and fallacious." 92 Cong. Rec. 9092.

> authority of law, and through no fault of the contractor he lost money, whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?" *Ibid.*

Mr. Weitzel replied that

> "a better approach would be to authorize the presentation of *claims for losses* to a designated agency or tribunal *for settlement upon an equitable basis*, and Senator, *that need not be limited* to claims for losses incurred in furtherance of the war effort * * *. The primary thing, though, is that a specific tribunal such as the Court of Claims would be given the authority in the legislation to hear and pass upon *equitable claims* of contractors *for losses incurred* during the war period on contracts with the Government." Hearings, 29.

The subcommittee considered seven cases in which contractors were denied First War Powers Act relief. Only two of these turned on the interpretation that V-J Day deprived the Government of the authority to grant relief.[6] And even in these cases a Government spokesman testified that relief could not be granted for reasons independent of V-J Day.[7] In the other five cases the Government denied, for reasons apart from V-J Day, that it had power to grant relief.[8] Colonel Holland testified that the War Department could not give relief in three of the cases. Chairman McCarran then asked

> "studying *this bill* as it is now worded, *will it accomplish the relief in these cases we have listened to?* * * *"

---

[6] The *Lake States Engineering Co.* case and the *Enjay Construction Co.* case, discussed at Hearings, pp. 16-17 and 19-21, respectively.

[7] Hearings, 56.

[8] *Hanover Mills:* Hearings 17-19; *McGann Mfg. Co.:* Hearings, 9-10; *Wullschleger:* Hearings, 10-11; *Shank Metal Products Co.:* Hearings, 11-12; *Merrimac Mills:* Hearings, 24-26.

Colonel Holland:

> "Assuming the merits to be as stated * * *, assuming the Committee feels they should get relief, we feel that *relief could be granted under the terms as written* * * *." Hearings, 56.

Impressed with the hardship case histories,[9] Chairman McCarran said:

> "I think that *those who meritoriously contributed to war effort should not be permitted to lose.* * * * We will try to draft the bill, with the aid of the best counsel we can secure, and we may not pass the bill as it is now, and it may not pass at all, but if I had the doing of it alone, it would pass, but *would pass in such a way that it would meet the point emphatically.*" *Id.* at 44.

Later, he added:

> "It is always an element of justice that we try to apply to those who aided us in the way these companies did in the war.
>
> * * * *
>
> "Take the road outfit * * *. It impresses me very much that due to certain conditions, if the facts were as stated, they would be *entitled to equitable relief, fair relief.*
>
> "All the government wants to do is *deal fairly with those who aided the Government* in its great struggle." Hearings, 65-66.

This summation by Senator McCarran affords eloquent testimony of the intention to go beyond the niggling relief to which the Armed Services repeatedly sought to limit the

---

[9] Early in the Hearings, Chairman McCarran said:

> "The presentation so far made impresses me very, very much, that some legislation of this type is necessary. The legislation that we have before us in its present verbiage may not be that which is essential, *but something is essential to bring about a measure of justice here.*" Hearings, 27.

proposed legislation[10] and, which, having been defeated, they now seek to accomplish by administrative ukase.

In the statute, there was substituted for the original phrase

> "to prevent a manifest injustice"

the present language of § 1, authorizing relief for

> "equitable claims of contractors * * * for losses * * * incurred * * * without fault or negligence * * * ."

This change was foreshadowed by suggestions made at the Hearings. Probably the phrase "without fault" had its origin in Senator Revercomb's desire to grant relief not only for work done in furtherance of the war, but to include the case where:

> "the Government went into a contract under authority of law, and *through no fault of the contractor* he lost money * * *." Hearings, 28.

The Senator recurred to this point when he asked a witness:

> "Are you satisfied with the definite language in the bill, that such action is necessary to prevent a manifest injustice, or would you think it would be better to write in there * * * 'to pay and settle the losses actually incurred by the contractor, *without his fault*'?" Hearings, 35.[11]

---

[10] On March 18, 1946, for example, Secretary of War Patterson wrote Chairman McCarran of the Senate Judiciary Committee:

> "It is considered that relief granted under S. 1477 should not be broader than that granted under the First War Powers Act." Hearings, p. 6. See also letter of Acting Secretary of the Navy Kenney, May 2, 1946, Hearings, 3-5.

[11] Senator Revercomb had earlier said with respect to the original phrase "prevent a manifest injustice":

> "Is this not a claim based *upon actual loss without the fault* of the contractor?"

To which Mr. Weitzel, representing the General Accounting Office, replied:

> "That is the way it looks to us * * *." Hearings, 27.

Thus the settlement of "losses * * * incurred * * * without fault"—the present statutory phrase—was intended to be even broader than the phrase "prevent a manifest injustice," which the Attorney General had at the outset distinguished from the First War Powers phrase "facilitating the prosecution of the war." *Supra*, p. 8.

The qualification that there be "equitable claims" for losses, and a "fair and equitable settlement of claims" may be traced to the amendment offered by Senator Capehart, who wrote Senator Lucas that:

> "The Navy Department has approved the bill—with the exception that it suggests that the words 'to prevent manifest injustice' * * * should be more definitely explained. Yet, these words in your bill are almost identical in their meaning with the words '*upon a fair and equitable basis*'—which are the words found in the Dent Act relating to the Navy Department in section 1 thereof." Hearings, 81.

The representative of the General Accounting Office similarly suggested that provision should be made for

> "settlement upon an *equitable basis*,"

and that a tribunal be established to

> "pass upon *equitable claims* of contractors for *losses incurred* * * *." Hearings, 29.

Thus the Chairman's insistence upon "equitable relief, fair relief," upon dealing "fairly with those who aided the Government," Hearings 65, found unmistakable expression in the statute.

In the teeth of this history and of the language deliberately chosen to cure the mischief there disclosed, the Government's contention that the Lucas Act is no more than a temporal extension of the First War Powers Act

is merely a renewal in the courts of the battle it fought and lost in the Congress.[12]

Ultimately, the government's position rests on paragraph 307 of Executive Order No. 9786, *supra*, note 1, and a portion of the Committee Report accompanying the Act. It can find support in neither.

Executive Orders like administrative regulations may not be inconsistent with or in contradiction to the statutes they seek to implement. The only authority conferred by a statute, this Court has admonished, is to issue orders and "to make regulations to carry out the purposes of the Act —not to amend it." *Miller* v. *United States*, 294 U. S. 435, 440 (1935), and cases cited. See also *Social Security Board* v. *Nierotko*, 327 U. S. 358, 370 (1946); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942). And this is no less true of the Executive Orders promulgated by the President, than it is of the regulations promulgated by lesser executive officials. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420-433 (1935).

The paragraph extracted from the Committee Report[13]

---

[12] In thus contending that the Lucas Act left them just where they were, the defense agencies richly fulfill the fears of Congress. Toward the conclusion of the Hearings, Chairman McCarran remarked

> "* * * we are now trying to enact a bill * * * and will the War Department have to interpret that bill also, or shall we *make it so plain that it will lay the road wide open for the War Department to render justice in a given case?* That is the thing that I have in mind * * *." Hearings, 50.

And he continued:

> "What I want to know is if everybody is satisfied that this bill in its present form will do the job * * * *I do not like to work for weeks and then put a bill through that * * * does not cover the case, or the War Department can say, 'Well, we are no better off than we were, because here is certain language that limits our action.* We recognize the merits of this case, but the language of this bill forestalls us'." Hearings, 50.

[13] "This bill, as amended, would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claim would have received favorable

is equally unavailing. This Court has indicated that where a Committee reports "the chief purpose" of a bill, a statute will not be narrowed when its terms and its history indicate a broader intention. *Canadian Aviator Ltd.* v. *United States*, 324 U.S. 215, 225 (1945); see also *Fides, A. G.* v. *Commissioner of Internal Revenue*, 137 F. (2d) 731, 734 (C.A. 4th, 1943). And this Court has refused to permit one illustrative example to outweigh general considerations regarding the meaning of a statute. *United States* v. *Ogilvie Hardware Co.*, 330 U.S. 709, 719 (1947). At best, the language of the Report constitutes a hasty and imperfect shorthand description that cannot be permitted to thwart the intention of Congress as exhibited in unequivocal terms in the Hearings, and given expression in language framed to cure the evils there disclosed.

## II.

## A Prior Settlement is Not a Bar.

1) The Statutory Terms.

The court below did not reach the question whether a prior settlement barred Lucas Act relief, but the district court ruled in favor of the Government on this issue. The Court of Claims, however, announced a contrary rule, and flatly held that paragraph 204 of the Executive Order

> "is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history." 83 F. Supp. at 342

We need only compare the Lucas Act provisions with paragraph 204 to demonstrate that the Order attempts to nullify the statute.

---

consideration under the First War Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government." Senate Report, No. 1669 (79th Cong. 2d Sess., 1946), p. 3.

There are remarks of a similar tenor by Senators Lucas and McCarran at 92 Cong. Rec. 9692 and Hearings 17.

Section 3 of the Lucas Act provides in pertinent part:

> "*a previous settlement* under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 *shall not operate to preclude further relief* otherwise allowable under this Act."

Paragraph 204 of Executive Order No. 9786 provides that:

> "no claim shall be considered if final action[14] with respect thereto was taken on or before that date [August 14, 1945]."

Manifestly, when the statute declares that "a previous settlement [importing final action] * * * shall not operate to preclude further relief," a provision to the contrary in an Executive Order, namely, that "no claim shall be considered if final action with respect thereto was taken," is repugnant to the statute and void.

2) The Legislative History.

In its inception, S. 1477 declared in the second proviso that:

> "this section *shall not be applicable* to cases submitted under section 201 of the First War Powers Act, 1941, which have been *finally disposed of* under such section upon their merits prior to August 14, 1945." Hearings, 1.

The War Department wrote Senator McCarran that:

> "it would be *undesirable to reopen* at this time the large number of *contracts* which have been *completed and final payment made* thereon. * * * Furthermore, if a contract has been terminated and final settlement reached, the finality provided in such cases by the Contract Settlement Act of 1944 should be preserved." Hearings, 6.

[14] The Contract Settlement Act of 1944, 41 U.S.C. 106, makes agreements of settlement "final and conclusive." See *infra*, page 19.

The restrictive effect of this position was emphasized by Mr. Weitzel, representing the General Accounting Office:

> "the provisions of the bill are not to be applicable to cases finally disposed of on their merits under section 201 of the First War Powers Act prior to August 14, 1945. *This provision* would seem to *exclude* many cases which presumably, if they had any merit, were *determined prior to that date*, and *might leave rather a small area* upon which the bill could operate." Hearings, 28.

He continued:

> "I think, too, if you give effect to the provisions of this bill, *you will exclude* many cases which might be thought meritorious by the contractors, but which were *decided adversely to the contractors* for this very reason, that the department thought that action would not be in furtherance of the war effort."
>
> "* * * That may not be the intended approach under this bill, but the *language of the bill* has that limitation, that *if the case was settled* under the First War Powers Act, *it could not be reopened now.*"[15] Hearings, 29.

In response to this and other criticism, the original "finality" provision was not merely elided—the Congress took the additional precaution *expressly* to remove the bar of prior settlements. Here, as in *Border Pipe Line Co.* v. *Federal Power Commission*, 171 F. (2d) 149, 152 (App. D. C., 1948), the Court is asked

> "to read the statutory definition as though it contained the phrase originally included but later eliminated by Congress in the legislative course of the Act. This

---

[15] Mr. Weitzel's remarks carried great weight, as may be seen from Senator McCarran's remark:

> "I want to say to you that some of his comments struck me forcibly. In other words, that the *very thing* that we are seeking to do by this bill *might not be done by reason of certain language* of the bill." Hearings, 35.

Senator McCarran mistakenly identified Weitzel as the representative of the Comptroller General's Office, which had no representative at the hearing.

> we cannot do. We cannot write into an act of Congress a provision which Congress affirmatively omitted."

This was likewise the view of the Court of Claims. 83 F. Sup. at 342.

It remains to examine the remark made by Chairman McCarran:

> "I do not understand that the idea of the bill is to direct payment of something that was turned down on its merits." Hearings, 64.

But he went on to say,

> "I do not think the Congress of the United States will want to inject itself into a judgment on the merits, *on the facts.*" Hearings, 65.

But many claims which had been dismissed "on the merits" justified relief on equitable grounds. Moreover, partial relief granted to keep a contractor alive for the war effort was a final decision "on the merits," and a bar precluding the reopening of such decisions would be inconsistent with the "equitable" purpose of the bill, i.e. "to prevent manifest injustice." This became clear after a colloquy between Mr. Weitzel and Colonel Holland of the Contracts Relief Advisory Committee of the War Department. Mr. Weitzel:

> "Suppose a claimant claims $500,000 and you feel $300,000 would keep him in business, and awarded him that; would that be final?"

Colonel Holland:

> "Yes * * *."

Mr. Weitzel:

> "That being the case, would that preclude determination of some cases decided on the merits?"

Colonel Holland:

> "I think it would be precluding to all."

* * *

Mr. Weitzel:

> "I am just trying to see if something cannot be done to put safeguards in the bill without affecting any relief which the committee feels should be granted against bona fide loss in performing these contracts." Hearings, 62.

Such "partial" settlements obviously did not make good the contractors' losses.

Moreover, if contractors whose claims had been rejected prior to V-J Day because they were not essential to the war effort were now to be paid in full for losses, an unfair discrimination would result against the indispensable contractors who had received by way of settlement only enough to keep them afloat. Such a discrimination was patently at war with any attempt "to prevent a manifest injustice." [16]

Against this background, the elision of the original proviso barring cases involving earlier final dispositions on the merits and the substitution of the present proviso that a "previous settlement" shall not preclude "further relief," is decisive against the Government.

The Government has countered by arguing that the word "settlement" is a word of art, meaning a "unilateral" determination by the Government, and not including bilateral agreements by contractors with the Government. The argument is untenable. In implementation of the First

---

[16] Various contractors urged that previous settlements be reopened. Hearings 26, 49. In a similar situation, this Court said

> "The counsel who had represented Crane-Johnson * * * appeared * * * before the Senate Committee and made a plea for relief * * *. He urged that such corporations had been 'caught in a trap', and that they were justly entitled to have a refund for that reason. It was apparently in response to the foregoing complaints that the relief provision before us, not part of the House bill as it came to the Senate, was introduced by the Senate Committee. We think Congress was moved to relieve those corporations which it considered to be 'caught in a trap' * * *". *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 716-717 (1947).

War Powers Act, Executive Order No. 9001 provided in Title I, par. 3, that

> "The War Department, the Navy Department * * * *may by agreement* modify or amend or *settle* claims under contracts heretofore or hereafter made * * * and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort * * *".

Manifestly settlements created by bilateral agreements were thus specifically authorized. The Contract Settlement Act of 1944, to which §3 of the Lucas Act refers, shows even more clearly that the word "settlement" was designed to comprehend both unilateral and bilateral agreements. Section 106(c) of that Act provides:

> "Any contracting agency may *settle* all or any part of any termination claim under any war contract *by agreement* with the war contractor, *or by determination* of the amount due on the claim or part thereof *without such agreement* * * *. Where any such *settlement is made by agreement*, the settlement shall be final and conclusive * * *." 41 U. S. C. § 106(c).

Furthermore, the Government's position would render the "settlement" provision pointless. The Contract Settlement Act of 1944 provides that no appeal may be taken from bilateral agreements, but that there may be appeals from unilateral determinations. Under the Government's construction of "settlement" in the Lucas Act, there would be a superfluous new right of appeal from a unilateral determination, whereas the earlier non-appealable bilateral agreement would be untouched, thus leaving the contractor exactly where he was before the Lucas Act was passed. But the Congress sought to rescue the contractor from that hapless plight. See *Howard Industries, Inc.* v. *United States*, 83 F. Supp. 337, 341. As was said in that case,

> "The word 'settlement' * * * was used in two senses in both the First War Powers Act and in the Contract

Settlement Act, that is, settlement by unilateral agency determination, and settlement by bilateral agreement. The Lucas Act merely says that settlements (without qualification) under either or both acts shall not operate as a bar. From the plain language of the act, we can only conclude that the word 'settlement' was intended to include both kinds of settlement provided for in the two Acts mentioned in section 3." *Id.* at 342.

We submit that Section 3 of the Lucas Act means exactly what it says:

> "a previous settlement under the First War Powers Act, 1941,[17] or the Contract-Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable[18] under this Act."

## III.

## Written Request for Relief.

Section 3 of the Lucas Act provides that claims shall be limited to

> "losses with respect to which a written request for relief was filed * * *."

---

[17] Perhaps the settlement in the *Fogarty* case is atypical, for it involved approval by the bankrupty court. The Court below held that the settlement

> "was not a settlement of claims for relief under the First War Powers Act, but was a final adjudication by the bankruptcy court of appellant's claims against the Navy Department * * *." 176 F. (2d) at 601.

Amicus takes no position as to whether such a settlement is or is not within the purview of §3 of the Lucas Act.

[18] In the Court of Claims the Government took refuge in the words "otherwise allowable under this Act," urging that §6 of the Lucas Act limited judicial determination to an amount not exceeding the amount which might have been allowed by the agency under the terms of the Act. Reliance was placed on the limitations placed on relief by paragraphs 204 and 307 of the Executive Order, which made administrative disallowance mandatory. Therefore, the Government urged the relief was not "otherwise allowable under this Act." The Court held that since both regulations were invalid, the relief was in fact "otherwise allowable." 83 F. Supp. at 342-343.

In the words of the Government, the court below held that such a request

> "must have been a request for the kind of modification without consideration made available by Section 201 of the First War Powers Act * * *." Memorandum for the United States, p. 2.

This ruling merely restates the untenable argument that the Lucas Act did no more than extend the period within which First War Powers relief could be granted.

In various courts, however, the Government has contended that the provision means that a contractor must have filed a new request for further relief after his termination claims have been disposed of; it has argued that the provision requires that the writing requesting relief contain the word "losses;" and it has claimed that the written request for relief must be in a special form.

Congress did not insist upon the clairvoyant filing of requests for additional relief before enabling legislation made further relief possible. Prior to the Lucas Act, the Government had disabled itself from granting relief which did not fall into narrow categories. Moreover, settlements made under the Contract Settlement Act were "final and conclusive." Hence any requests for further relief, would have been utterly futile.[19]

Nor is there any magic in the word "losses."[20] No em-

---

[19] "We cannot believe that when Congress enacted the Lucas Act in 1946 it intended that relief under that Act should be conditioned on a plaintiff's having filed a request for relief that the Governent had, by statute, disabled itself from granting." *Howard Industries, Inc.* v. *United States*, 83 F. Supp. at 343.

[20] In the *Fogarty* case, the district court stated:

"The invoices contained nothing to identify them as requests for relief from losses and as applications for First War Powers Act relief rather than for extras under the contract. Obviously a contractor may present claims for extras without representing either that he sustained a loss or that he seeks relief from a loss. The word 'losses' was conspicuously missing. The documents now relied on by petitioner were invoices for money claimed under the contracts. They are not written requests for relief from losses within the meaning of the act." 80 F. Supp. at 92-93.

phasis is placed upon this word in the statute. The existence of losses is, of course, important because the fact is the basis of "further relief." But to require that the word "losses" appear in a request for relief would place a premium upon prophecy. Prior to the passage of the Lucas Act, contractors could not have guessed that the word "losses" would be the "Open Sesame" to future relief. To insist on such prescience is to thwart Congress' intention to grant "further relief."[21]

By the same token, there is no requirement that requests for relief must have been cast in some particular form. The Act merely provides that claims be limited

> "to losses with respect to which a *written request for relief* was filed."

In employing simple and homely terms, Congress shied clear of any dogmatic insistence on form. A writing which shows in one form or another[22] that relief was requested satisfies the Act. All that is required by the statute is a writing filed prior to August 14, 1945, which shows on its face that losses have been incurred, and that the contractor seeks to be made whole, whether by a claim for extra compensation, by "adjustment," or the like. Only in this way can the statute be given effect. This was the holding

---

[21] "Surely a claimant under the Lucas Act is not to be barred because, when it sought relief months before August 14, 1945, it was not enough of a prophet to phrase its claims specifically in the words of a statute which was still months in the future. It is enough if, before that critical date, it put the government on notice that it sought not merely such adjustments as it might be entitled to have made as a matter of right under its contract, but also that it asked relief over and above its strict contract rights." *Prebilt Co.* v. *United States*, 88 F. Supp. 588, 591 (D. C. Mass., 1950).

[22] "* * * now I am talking primarily about where contractors are applying for relief *in one form or another*." Senator Lucas at Hearings, 20.

of the Court of Claims.[23] The contrary position of the Government renders the statute a still-born abortion. This, as we shall now show, has been placed beyond doubt by the subsequent action of Congress.

## IV.

## Congress Has Expressly Repudiated the Government's Position.

In passing a "clarifying" amendment, both the Senate and the House stingingly repudiated the construction given to the Lucas Act by the Government. The House bill, H.R. 3436 (81st Cong. 1st Sess.) was addressed to the "request for relief" provision, and the report of the Committee on the Judiciary (H. Rept. No. 422, April 11, 1949) stated with respect to the administrative construction

> "We believe this construction to be an *erroneous interpretation of the intention of Congress* in passing the Lucas Act. We believe that while relief under the First War Powers Act to World War II contractors was predicated solely on the interest of the Government in prosecuting the war, the Lucas Act was more remedial in its nature. *The Lucas Act was broader in its application* and under it the contractor was required to show, not that the granting of relief would facilitate prosecution of the war; but that, without fault or negligence on his part, he had suffered a net loss on his Government contracts during the statutory period, and that during that period he had requested relief in writing from the agency or department involved.
>
> "The committee is informed that the *technicality* most frequently indulged in by the Government in its rejection of claims under the Lucas Act has been that

[23] It held that the "request for relief" provision "merely means * * * that claimants must be able to show that they had made timely * * * protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims." 83 F. Supp. at 343.

the request for relief lacked the *formalities which the agencies read into the simple language* of the act, but as to which the act was silent. Thus, it is contended that the request for relief referred to in the statute required a specific request that the contract be amended without consideration under the extraordinary contracting authority conferred by the First War Powers Act. *The act cannot and should not be so read.*"

* * * * *

"It is the *purpose of the bill to relax the agency-imposed formal requirements of these requests for* relief and to make equivalents out of such tangibles as demands for payment of losses or statements of such losses which were sufficient to inform the Government or the prime contractor (in the case of subcontractors) that a loss was being suffered, was anticipated, or had been suffered by the contractor or subcontractor in connection with the work in question." (pp. 1-2)

The Senate report (S. Rept. No. 1632, 81st Cong. 2d Sess, May 17, 1950) was even more severe in its criticism. It stated that:

"The present proposed amendments to the Lucas Act stem largely from *erroneous and restrictive interpretation* of that act." (p. 3)

* * * *

"The committee are of the opinion that H.R. 3436 should be enacted, since it is abundantly clear that *the administrative interpretation of the Lucas Act is in effect an abrogation of that act.* * * * It is the opinion of the committee, as demonstrated in the report, that the purpose of the Lucas Act was to afford a broader basis of relief than had been given in the First War Powers Act of 1941, and that, beyond question, *this purpose was aborted by the strict administrative interpretations.* The intent of the present bill is to restore the relief provisions of the Lucas Act, and the committee, in approving H.R. 3436, wish it made clear that this bill, as amended, affords what the committee consider a just and equitable basis for relief, not confined to relief which might have been afforded under the First War Powers Act." (p. 6)

And the Senate Committee added that:

> "the committee agree that the *administrative interpretations of the Lucas Act in effect abrogated that act* * * *." *Ibid.*

The bill as approved in the Senate was passed by both the Senate and the House, but it was vetoed by the President. In his veto message the President stated

> "I cannot accept the contention that the purpose of the War Contractors Relief Act, which H.R. 3436 would amend, was other than to provide a basis for relief to those contractors whose cases would have been handled under the First War Powers Act if war had not ended. Had I believed there was a broader purpose, I would not have issued the kind of regulations which were promulgated in Executive Order 9786." H.R. Doc. No. 629, 81st Cong. 2d Sess., June 30, 1950, p. 2.

The Presidential point of view is not altogether surprising when it is recalled that the Attorney General, who has maintained that point of view in the courts, drafts or assists in drafting both executive orders and veto messages.

The Congress, however, has not let the matter rest. In S. Rept. No. 2052 (81st Cong. 2d Sess., July 17, 1950), accompanying S. 3906, a new bill, the Senate reaffirmed its position, stating (p. 2) that no relief has been secured by smaller contractors because of

> "*technical and restrictive interpretations* of the phrase 'request for relief' in section 3 of the act. * * * It was intended by Congress, of course, that it should include (but not be limited to) relief through a change of contract terms as authorized by the First War Powers Act. That act permitted, and thereunder contracting agencies of the Government accorded, various types and forms of relief. Contractors could seek relief in many other ways * * * as [by] a simple petition."

The House (H. Rept. No. 2704, 81st Cong. 2d Sess., July 20, 1950, to accompany H. R. 9121) was at pains to state that the new bill

"is designed not only to comply with the specifically enumerated proposals contained in the veto message for legislation acceptable to the President, but also *to reassert the original purposes of the Lucas Act.*

"Consideration of the construction and interpretation of the Lucas Act by the administering agencies clearly reveals the necessity for clarifying legislation. The *frustration of the original intent* of the Lucas Act is adequately described in the House Committee report which accompanied H. R. 3436 (H. Rept. 422, 81st Cong.), to which we advert with approval." (p. 1)

The report continues that

"it was the intention of Congress by the Lucas Act, as reaffirmed by this measure, not to preclude consideration of losses not reimbursed under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, if otherwise allowable under the Lucas Act."

* * * * *

"The most frequent basis for controversy in cases decided by the administering agencies pursuant to the Lucas Act has been as to whether claimants had complied with the legal niceties of interpretation by the agencies of the simple term 'request for relief.' This issue was thoroughly discussed in the report of this committee hereinbefore referred to. We understand that *the administration is in thorough agreement with our previously expressed view that failure to conform to the technical requirements imposed* by the agencies *should not bar recovery* in meritorious cases. The present bill follows literally the President's recommendations on this subject by requiring that the request, notice, or demand be in writing and filed prior to August 14, 1945. In order to avoid any further doubt arising from the language of the reported bill, we wish to make it abundantly clear that the *precise form of the request for relief is immaterial* so long as it is in writing and is either (*a*) a specific request for relief available under the First War Powers Act, 1941, or (*b*) a demand for payment of losses, or (*c*) a notice of such sustained or impending loss. The President listed these three varieties in the alternative, and none

of them is to be construed as to limit or modify any one or both of these others." (pp. 1-3)

The history of the Lucas Act earlier outlined abundantly supports the views of the Committees on the Judiciary in both Houses respecting the original intention to grant broader relief than was provided by the First War Powers Act. And we need not dwell on the weight that is attached to an unequivocal interpretation by the Congress of its own prior legislation. If great weight is to be attached under the "reenactment rules" to the silence of Congress in the face of administrative constructions,[24] the categorical, express repudiation by the Congress of administrative constructions must be given no less. Under all the circumstances, we submit that the conflicting Presidential veto is entitled to little weight. The President made no comment respecting the content of the Lucas Act when he signed the bill. The Executive Order, drafted by the Attorney General, attempted to read into the statute requirements that the Congress had emphatically rejected. The President cannot read into an act requirements so rejected, whether by Executive Order or veto. To permit him to do so would constitute him a super-legislature, and to amend legislation by Executive Order or subsequent veto.

## CONCLUSION.

The Lucas Act represents a thorough-going attempt to strike the interpretive shackles with which the administrators had fettered themselves. On this score, we have the last word uttered to the Senate by Senator Revercomb

> "With respect to the Navy's construction, under the present War Powers Act of the right to make settle-

[24] Compare the weight attached to

> "the fact that Congress has twice refused to write the Custodian's present construction into the law." *Uebersee Finanz-Korp.* v. *Markham*, 158 F. (2d) 313, 316 (App. D. C., 1946).

Here there is a well-documented rejection of the administrative construction and a purposeful "clarification" thereof.

ment, let me say *I hope this bill supersedes in every respect every right derived from the War Powers Act for such settlements.*" 92 Cong. Rec. 9092.

We submit that the plain language of the Lucas Act and the clearly expressed intention of Congress as disclosed in the legislative history require that Paragraphs 307 and 204 of Executive Order 9786 be declared invalid, and that the decision of the court below respecting the scope and requirements of the Lucas Act be reversed.

Respectfully submitted,

RAOUL BERGER
*Attorney for Amicus Curiae*
Suite 1116, Ring Building
1200 - 18th Street, N. W.
Washington 6, D. C.

*Of Counsel*
GOTTLIEB, SCHWARTZ & FRIEDMAN
Chicago, Illinois

September 15, 1950.